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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 **HAROLD B. SHAMBURGER,**

16 Plaintiff,

17 v.

18 **R. KIRKLAND, et al.,**

19 Defendants.
20

21 **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS**
22 **PLAINTIFF'S COMPLAINT; SUPPORTING MEMORANDUM OF POINTS**
23 **AND AUTHORITIES**
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Court Rules

Federal Rule of Civil Procedure

Rule 12(b)

Rule 12(b)(6)

Rule 56

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15 **HAROLD B. SHAMBURGER,**

16 Plaintiff,

17 v.

18 **R. KIRKLAND, et al.,**

19 Defendants.
20

C 07-4597 JSW (PR)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFF'S
COMPLAINT; SUPPORTING
MEMORANDUM OF POINTS
AND AUTHORITIES**

21 TO PRO SE PLAINTIFF HAROLD B. SHAMBURGER:

22 PLEASE TAKE NOTICE that Defendants Cook, Fischer, Foss, Kirkland, McGuyer,
23 O'Neill, Pena, Randolph, Ruff, Smith, and Stewart (Defendants) hereby move under Federal
24 Rule of Civil Procedure 12(b) to dismiss this 42 U.S.C. § 1983 action for failure to exhaust
25 administrative remedies as mandated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).
26 Defendants also move under Rule 12(b)(6) to dismiss the claims against them because the claims
27 are barred by the statute of limitations. Finally, Defendants move under Federal Rule of Civil
28 Procedure Rule 56 for this Court to grant summary judgment on the basis that there are no

Defs.' Mots. Dismiss & Summ. J.

Shamburger v. Kirkland, et al.
C 07-4597 JSW (PR)

1 genuine issues of material fact, that Defendants are entitled to judgment as a matter of law, and
 2 that they are entitled to qualified immunity.

3 The motion is based on this notice, the memorandum of points and authorities filed in
 4 support, the attached declaration, and the pleadings and records on file in this case.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **Statement of Issues**

7 Plaintiff Shamburger is an inmate housed in Pelican Bay State Prison's Security Housing
 8 Unit (SHU) because he is an active prison-gang participant. He raises various allegations
 9 concerning his continued housing in the SHU.

10 1. Has Shamburger properly exhausted his administrative remedies for all his claims
 11 where he has only pursued to a final decision one related administrative grievance, which takes
 12 issue with his timely receipt of housing-committee reviews and also the reliability of source
 13 items found to indicate active prison-gang activity in a 2006 prison-gang-status review?

14 2. Does the statute of limitations bar any of Shamburger's claims, some of which
 15 originated at least eight years before he filed suit?

16 3. Did Shamburger receive due process when he was reviewed for inactive gang status?

17 **Statement of the Case**

18
 19 Plaintiff Shamburger, an inmate upset with his placement and retention in the SHU, filed an
 20 eight-claim complaint seeking damages and injunctive relief under 42 U.S.C. § 1983 on
 21 September 5, 2007. (Compl.) This Court screened the complaint under 28 U.S.C. § 1915.
 22 (Order Service.) Of Shamburger's eight alleged claims (Compl. 15–18), the Court screened out
 23 the first claim because hardship stemming from the SHU conditions is not so severe as to violate
 24 the Due Process Clause (Order Service 2). The Court also dismissed without prejudice
 25 Shamburger's sixth and eighth claims, because they were unrelated to Shamburger's placement
 26 and retention in the SHU. (*Id.* 3.) Ultimately, the Court identified four cognizable claims
 27 concerning Shamburger's placement and retention in the SHU: (1) due-process violation under
 28 the California Constitution; (2) due-process violation of state-created liberty interest; (3) First

1 Amendment violation rising from allegations that Shamburger's SHU placement was retaliation
 2 for jailhouse lawyering; and (4) Eighth Amendment violation rising from the SHU living
 3 conditions. (Order of Service 2.)

4 5 Statement of Facts

6 1. CDCR has a four-level administrative-appeals process that permits its inmates to
 7 grieve "any departmental decision, action, condition, or policy which they can demonstrate as
 8 having an adverse affect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). The four
 9 levels of appeal include: (1) an informal level, (2) a first formal level of review, (3) a second
 10 level review to the institution head or designated representative, and (4) a final third level of
 11 appeal to the Director of the CDCR or designated representative. Cal. Code Regs. tit. 15, §
 12 3084.5. A decision at the Director's level constitutes exhaustion of an inmate's administrative
 13 remedies. Cal. Code Regs. tit. 15, § 3084.1(a).

14 2. Shamburger was validated as a Black Guerilla Family prison-gang member in 1995,
 15 and has since been housed in the Pelican Bay SHU. (Decl. Rice Supp. Defs.' Mot. Summ. J.
 16 (Decl. Rice) ¶ 4.) The SHU provides the highest-security inmate housing at Pelican Bay. (Decl.
 17 Rice ¶ 2.)

18 3. CDCR provides inmates housed indeterminately in the SHU, like validated prison-
 19 gang members, with regular classification-committee reviews of housing at least every 180 days.
 20 Cal. Code Regs. tit. 15, § 3341.5(c)(2)(A).

21 4. Between December 2001 and January 2008—a period of roughly six
 22 years—Shamburger received fifteen classification-committee reviews concerning his housing,
 23 which is three more reviews than the two-per-year requirement. In every one of these fifteen
 24 housing reviews, Shamburger is documented to have refused to appear before the committee. 5.

25 5. Only an inactive prison-gang member can appear before the Departmental Review
 26 Board to be considered by the board for a housing move to the general prison population. *See*
 27 Cal. Code Regs. tit. 15, § 3341.5(c)(5).

28 6. In 2006, Defendant Correctional Sergeant Stewart, an Institutional Gang Investigator
 Defs.' Mots. Dismiss & Summ. J.

(IGI) at Pelican Bay, investigated Shamburger for recent prison-gang activity to determine whether he was still actively involved in the Black Guerilla Family prison gang. (Decl. Rice ¶ 5.) Sgt. Stewart documented three source items indicating Shamburger's continuing prison-gang participation, provided Shamburger with the report describing this evidence, and afforded Shamburger the opportunity to discuss and take issue with the evidence. (Decl. Rice ¶¶ 5–9.) Shamburger declined, stating that, "I have it in the courts." (Decl. Rice ¶ 9.) The Office of Correctional Safety reviewed and approved the three source items documented by Sgt. Stewart to indicate Shamburger's continuing prison-gang participation. (Decl. Rice ¶ 5.)

Argument

I.

MOST CLAIMS MUST BE DISMISSED BECAUSE SHAMBURGER DID NOT EXHAUST HIS AVAILABLE REMEDIES BEFORE FILING SUIT.

A. Exhaustion is Required Before Filing Suit in Federal Court.

This action must be dismissed because Shamburger has failed to exhaust administrative remedies for the claims in his complaint as required by 42 U.S.C. § 1997e(a). In the Prison Litigation Reform Act, Congress amended 42 U.S.C. § 1997e(a) and imposed a mandatory exhaustion requirement on suits brought by inmates. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002). The amended 42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted." *See* 42 U.S.C. § 1997e(a). *Proper* exhaustion of a prisoner's administrative remedies is necessary. *Woodford v. Ngo*, 548 U.S. 81, 83 (2006). The exhaustion requirement is a prerequisite to all federal suits, "[e]ven when the prisoner seeks relief not available in grievance proceedings, notably money damages." *Porter*, 534 U.S. at 524; *see also Booth v. Churner*, 532 U.S. 731, 738 (2001). It applies to "all suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 524 U.S. at 532.

1 The purposes of the exhaustion requirement are to “afford corrections officials time and
 2 opportunity to address complaints internally before allowing the initiation of a federal case,” to
 3 “filter out some frivolous claims,” and to possibly “satisfy the inmate, thereby obviating the need
 4 for litigation.” *Porter*, 534 U.S. at 525; *see also Booth*, 532 U.S. at 737 (stating that “requiring
 5 [administrative] exhaustion . . . would satisfy some inmates who start out asking for nothing but
 6 money, since the very fact of being heard and prompting administrative change can mollify
 7 passions”). Finally, for suits that do end up in federal court, exhaustion tends to improve their
 8 quality by creating an administrative record that is helpful to the court in determining the
 9 contours of the controversy. *Woodford*, 548 U.S. at 92; *see also Booth*, 534 U.S. at 525.

10 The Ninth Circuit recognizes a defendant’s right to raise a plaintiff’s failure to exhaust
 11 administrative remedies in a “nonenumerated” Rule 12(b) motion to dismiss. *Wyatt v. Terhune*,
 12 315 F.3d 1108, 1119-20 (9th Cir. 2003); *Ritza v. Int’l Longshoremen’s & Warehousemen’s*
 13 *Union*, 837 F.2d 365, 368–69 (9th Cir. 1988). A defendant can support the motion with evidence
 14 and affidavits extrinsic to the complaint. *Wyatt*, 315 F.3d at 1119-20. The Court can resolve
 15 factual issues, which are reviewed for clear error. *Ritza*, 837 F.2d at 369. The proper remedy for
 16 failure to exhaust administrative remedies is dismissal without prejudice. *Id.* at 1120; *McKinney*
 17 *v. Carey*, 311 F.3d 1198, 1199–201 (9th Cir. 2002).

18 **B. Shamburger Exhausted One Related Administrative Grievance Preceding This Action.**

19 Shamburger identifies his two administrative grievances that form the basis of his action;
 20 they are attached to his complaint following Exhibit D, in a section titled Exhaustion of
 21 Administrative Remedies. (Compl.) Shamburger thus concedes, at least implicitly, that none of
 22 his other administrative grievances concern the claims at issue here. *See, e.g., Wyatt v. Terhune*,
 23 315 F.3d 1108, 1120 (9th Cir. 2003).

24 The grievance identified by number 02-01353 was first submitted by Shamburger on May 6,
 25 2002, and was partially granted by the Pelican Bay warden on June 26, 2002. The appeal
 26 addressed two issues. The first issue concerned a confiscated dictionary, and Shamburger was
 27 ultimately allowed to decide the disposition of the dictionary. The second issue concerned denial
 28 of an earlier grievance from April 25, 2000 (see Compl. 11, ¶ 62), which took issue with

1 CDCR's February 2000 determination that Shamburger was an active prison-gang member who
 2 would remain indeterminately in the SHU. Although the April 25, 2000 grievance was denied
 3 for its untimely submission, CDCR retained no evidence of Shamburger's submission date, and
 4 the Pelican Bay warden decided to allow Shamburger to file a new grievance appealing the
 5 February 2000 decision that he remained an active prison-gang member. Although Shamburger
 6 asserts that he was prevented from exhausting a renewed grievance concerning his active prison-
 7 gang status (see Compl. 11-12, ¶¶ 65-69), he ultimately later did exhaust this issue in the
 8 grievance discussed below.

9 In the grievance identified by number 06-01933, which Shamburger submitted on August 7,
 10 2006, Shamburger makes two allegations: (1) that he was denied timely and meaningful 180-day
 11 committee reviews concerning his housing, and review by the Director's Review Board for
 12 prospective release to the general population; and (2) that the three source items used to
 13 determine that he was an active prison-gang member in 2006 were unreliable. Shamburger
 14 exhausted this grievance on January 17, 2007.

15 **C. Shamburger's Administrative Grievances Did Not Address the Allegations Related to**
 16 **his Fourth, Fifth, and Seventh Claims.**

17 Although Shamburger did exhaust administrative remedies concerning his allegations that
 18 he is not an active prison-gang member and not receiving regular and meaningful housing
 19 reviews, his appeals did not address the allegations from his fourth, fifth, and seventh claims.

20 Specifically, Shamburger's fourth claim alleges a First Amendment violation in that he
 21 opines he remains in SHU as retaliation for his jailhouse lawyering (Compl. 16)—although
 22 issues of First Amendment speech and retaliation are not remotely touched on by the grievances
 23 pointed to by Shamburger himself as meeting his exhaustion requirement before filing suit.

24 Similarly, Shamburger's fifth claim alleges that his retention in the SHU rises to an Eighth
 25 Amendment violation of the clause prescribing cruel and unusual punishment. (Compl. 16-17.)
 26 Shamburger's seventh claim likewise alleges that his retention in the SHU rises to an Eighth
 27 Amendment violation of the clause prescribing cruel and unusual punishment, and that
 28 Defendants have been deliberately indifferent to his well-being by allowing him to be housed in

1 the SHU. (Compl. 17.) But Shamburger did not exhaust a grievance alleging that his conditions
 2 in the SHU were inhabitable, oppressive, or somehow amounted to cruel and unusual
 3 punishment, or that Defendants have disregarded some risk to his well-being by leaving him to
 4 remain in the SHU. Indeed, Shamburger does not even discuss these details in his complaint.

5 Because Shamburger's administrative appeals did not exhaust his administrative remedies
 6 for his fourth, fifth, and seventh claims, these claims must be dismissed.

7 **II.**
 8 **CLAIMS RISING FROM BEFORE SEPTEMBER 2003 ARE**
 9 **BARRED BY THE STATUTE OF LIMITATIONS.**

10 **A. Shamburger's Allegations Arguably Date Back to 2000.**

11 The statute of limitations begins to run once a plaintiff's cause of action has accrued. *See*
 12 *Two Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1998). Accrual, which is determined by federal
 13 law for civil-rights claims, occurs "when the plaintiff knows or has reason to know of the injury
 14 which is the basis of the action." *Id.* Here, Shamburger describes a February 2000 decision to
 15 continue to retain him in the SHU, and his attempts to exhaust administrative remedies
 16 concerning the issue. (Compl. 11.) Shamburger also describes a string of allegedly improper
 17 housing-committee decisions from December 2001 to January 2003. (Compl. 6.) Shamburger
 18 had reason to know of any injuries rising from the above incidents as they occurred, thus
 19 triggering accrual.

20 **B. The Limitations Period Applicable to Shamburger's § 1983 Claims Is Two Years at**
 21 **Most.**

22 Although federal law determines accrual, state law determines the statute of limitations for §
 23 1983 suits because § 1983 does not have its own federal limitations period. *See id.*; *Wilson v.*
 24 *Garcia*, 471 U.S. 261, 275 (1985). Because § 1983 actions are best characterized as actions for
 25 injuries to personal rights, federal courts borrow the state statute of limitations that applies to
 26 personal-injury actions. *See McDougal v. County of Imperial*, 942 F.2d 668, 672-74 (9th Cir.
 27 1991). In California, two years has been the relevant limitations period since January 1, 2003.
 28 Cal. Civ. Proc. Code § 335.1 (West 2006). Before January 1, 2003, the limitations period was
 only one year. Cal. Civ. Proc. Code § 340 (West 2002) (amended 2003). Although California

Code of Civil Procedure section 335.1 extended that period to two years on January 1, 2003, “[t]he terms of section 335.1 make plain that this change in statute of limitations does not apply retroactively” *See Jones v. Blanas* 393 F.3d 918, 927 (9th Cir. 2004) (holding that the new statute of limitations does not apply retroactively).

C. Shamburger’s Claims for Equitable Relief Toll for Two Years.

State law determines tolling issues in federal-civil-rights actions. *Hardin v. Straub*, 490 U.S. 526, 539 (1989); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485-86 (1980). Under California law, inmates who are sentenced “for a term less than life,” like Shamburger, are entitled to a two-year tolling period for claims seeking equitable relief. Cal. Civ. Proc. Code § 352.1(a), (c) (West 2006).

D. Shamburger Filed His Complaint More Than Four Years After Some Claims Accrued.

Shamburger filed suit on September 5, 2007. (Compl. 1.) Between two-years tolling and, at most, a two-year limitations period, any claim accruing before September 2003 is statutorily barred. Thus, to the extent Shamburger raises any claims concerning events occurring before September 2003 (including the above-discussed and unexhausted fifth and seventh claims alleging that the SHU environs are cruel and unusual), these claims are barred.

**III.
SHAMBURGER’S SECOND CLAIM SHOULD BE DISMISSED
BECAUSE HE FAILS TO RAISE A LEGITIMATE CLAIM.**

Shamburger’s second claim is for violation of due-process rights under the California Constitution, Article I, sections 7 and 15. (Compl. 15.) Specifically, Shamburger asserts that inmate housing segregation violates state due-process rights. (*Id.*)

But section 7 of the California Constitution concerns due-process rights affecting students’ school assignment and transportation—not state inmates’ housing concerns. And section 15 is equally inapplicable to Shamburger, at least in this civil venue, because the section concerns itself with the due-process rights of criminal defendants.

Therefore, Shamburger fails to raise any claim under the California Constitution, and his second claim must be dismissed.

//

IV.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT OF SHAMBURGER'S THIRD AND SOLE REMAINING CLAIM BECAUSE THE EVIDENCE SHOWS THAT HE IS AN ACTIVE PRISON-GANG MEMBER WHO HAS RECEIVED ALL PROCESS DUE HIM.

A. Only One of Shamburger's Eight Claims Remains to Be Addressed.

Of Shamburger's eight alleged claims (Compl. 15–18), the Court screened out the first claim because hardship stemming from the SHU conditions is not so severe as to violate the Due Process Clause. (Order Service 2.) The Court also dismissed without prejudice Shamburger's sixth and eighth claims, because they were unrelated to Shamburger's placement and retention in the SHU. (*Id.* 3.) And as discussed above, Shamburger's fifth and seventh claims, which allege that the SHU living conditions violate Shamburger's Eighth Amendment rights, must be dismissed because they violate the statute of limitations, and because the claims' administrative remedies were never exhausted. Likewise, Shamburger's fourth claim, which alleges that his retention in the SHU is retaliation for jailhouse lawyering, must be dismissed because the claim's administrative remedies were never exhausted. Finally, Shamburger's second claim, which alleges that his retention in the SHU violates state due process under California Constitution Article I, sections 7 and 15, must be dismissed for failure to raise any claim because the identified sections concern student transportation (section 7) and defendants in criminal cases (section 15).

In sum, only Shamburger's third claim remains to be addressed. In it, Shamburger alleges violation of a state-created liberty interest protected by his federal due-process rights. (Order Service 2; Compl. 15–16.) Shamburger organizes this claim into six sub-claims, A through F.

B. Defendants Are Entitled to Summary Judgment of Sub-Claims A, B, and D Because the Undisputed Evidence Shows that Shamburger Received All Process Due Him.

1. Contrary to Sub-Claim A, Shamburger Received Proper Housing Hearings.

In sub-claim A, Shamburger alleges that he was not allowed to present evidence or witnesses to refute his prison-gang status before his SHU term began. (Compl. 16.) But his SHU term began in 1995, when he was first validated as a prison-gang member. (Decl. Rice ¶ 4.) Such a claim is clearly barred by the statute of limitations. Rather, Shamburger must be

1 taking issue with his housing-committee reviews, which he alleged were neither timely nor
2 meaningful in his exhausted administrative grievance. But Shamburger is wrong on both these
3 counts. If he is complaining that he was denied state rights without due process, he must first
4 show that his state rights were violated—which he cannot.

5 Shamburger received more housing reviews than are required. CDCR provides inmates
6 housed indeterminately in the SHU, like validated prison-gang members such as Shamburger,
7 with regular classification-committee reviews of housing at least every 180 days. Cal. Code
8 Regs. tit. 15, § 3341.5(c)(2)(A). The undisputed evidence shows that between December 2001
9 and January 2008—a period of roughly six years—Shamburger received fifteen classification-
10 committee reviews concerning his housing, which is three more reviews than the two-per-year
11 requirement.

12 Shamburger's allegation that these housing reviews were not meaningful lies somewhere
13 between implausibility and hypocrisy because—in every one of these fifteen housing
14 reviews—Shamburger is documented to have refused to appear before the committee.
15 Shamburger cannot constantly eschew the due process offered to him, and then sue for its
16 absence.

17 Finally, Shamburger complained in his exhausted administrative grievance that he never
18 received a review by the Director's Review Board between February 2000 and March 2006. This
19 should be true because only an inactive prison-gang member can appear before the Departmental
20 Review Board to be considered by the board for a housing move to the general prison population.
21 See Cal. Code Regs. tit. 15, § 3341.5(c)(5). And Shamburger has never been placed on inactive
22 prison-gang status. Indeed, this suit turns primarily on Shamburger's contention that his 2006
23 gang-status review, which concluded that Shamburger remained an active prison-gang member,
24 relied on unreliable evidence to form this conclusion. Since Shamburger's 1995 prison-gang
25 validation, he has never been placed on inactive status. Therefore, his dearth of appearances
26 before the Departmental Review Board is completely appropriate.

27 //

28 //

1 **2. Contrary to Sub-Claim D, Housing Committees All Noted that Shamburger Was**
 2 **an Active Prison-Gang Member.**

3 In sub-claim D, Shamburger wrongly alleges that he was retained in the SHU without
 4 housing committees determining that he was an active prison-gang member. (Compl. 16.)
 5 Contrary to this allegation, each of the fifteen properly performed housing-committee reviews
 6 made note of the fact that Shamburger is an active prison-gang member.

7 **3. Contrary to Sub-Claim B, Shamburger Remains a Threat to Prison Security.**

8 In sub-claim B, Shamburger asserts that Defendants wrongly retained him in the SHU
 9 although he poses no threat to prison security. (Compl. 16.) But as discussed above,
 10 Shamburger was validated as a prison-gang member in 1995, and he has never had his active
 11 status with the prison gang changed to inactive. And state law observes that prison-gang
 12 members present “a severe threat to the safety of others or the security of the institution and will
 13 be placed in a SHU for an indeterminate term.” Cal. Code Regs. tit. 15, § 3341.5(c)(2)(A)(2).
 14 Because Shamburger is a validated and active prison-gang member, his retention in the SHU
 15 merely complies with state law and does not present any due-process violation.

16 **C. The Court Screened Out Sub-Claims E and F.**

17 The Court, in its screening order, already dismissed Shamburger’s unrelated claim
 18 concerning access to legal materials. (Order Service 3.) Shamburger not only raised this
 19 contention as his sixth claim (Compl. 17), but also as sub-claim F under his third claim (Compl.
 20 16).

21 In addition, the Court’s screening order made clear that the only actions remaining pertained
 22 to Shamburger’s placement and retention in the SHU. (Order Service 2.) In sub-claim E,
 23 Shamburger alleges that his difficulty in exhausting his administrative grievance concerning his
 24 retention in the SHU rose to a due-process violation. But the alleged unavailability of an
 25 administrative remedy does not concern Shamburger’s placement and retention in the SHU, and
 26 is thus screened out by the Court’s order. (*See id.*)

27 In any event, sub-claim E is meritless. Shamburger has no constitutional right to a prison
 28 administrative-appeal system. *See Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). A prison

1 official's involvement and actions in reviewing or investigating a prisoner's administrative
 2 appeal cannot serve as the basis for liability under a § 1983 action. *See Ramirez v. Galaza*, 334
 3 F.3d 850, 860 (9th Cir. 2003); *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993). Thus, sub-
 4 claim E must be dismissed even if the Court's screening order did not already serve to screen out
 5 the sub-claim.

6 **D. Defendants Are Entitled to Summary Judgment of Sole Remaining Sub-Claim C**
 7 **Because the Three Reliable Source Items Evidenced Shamburger's Continuing Prison-**
 8 **Gang Participation.**

9 We now arrive at the crux of Shamburger's complaint, wherein he alleges that the evidence
 10 used to determine his active gang status in 2006 was unreliable. (Compl. 16.) Shamburger chose
 11 not to dispute the evidence with the IGI, Defendant Correctional Sergeant Stewart (Decl. Rice ¶
 12 9), and instead exhausted an administrative grievance to argue the issue in the courts (Decl.
 13 Roost Supp. Defs.' Mot. Summ. J. (Decl. Roost) ¶ 4), in accord with his documented statement
 14 to Stewart.

15 To determine that an inmate is in a prison gang, leastwise that he remains active with the
 16 gang years later, the IGI must merely point to "some evidence" to support the decision and the
 17 segregation in SHU. *Toussaint v. McCarthy*, 801 F.2d 1080, 1105 (9th Cir. 1986). Here, three
 18 reliable source items indicate Shamburger's active prison-gang participation.

19 The first source item is a September 8, 2004 report describing a roster of Black Guerilla
 20 Family prison-gang members that was found in another Black Guerilla Family member's
 21 property. (Decl. Rice ¶ 6.) This roster reliably indicates Shamburger's active prison-gang
 22 participation because the roster is almost fully filled with the names of validated Black Guerilla
 23 Family participants, and it identifies Shamburger. (*Id.*) This roster is thinly camouflaged as a
 24 document from the "New Afrikan Revolutionary Nationalism" (NARN) group, which is
 25 organized by Black Guerilla Family members in the Pelican Bay SHU, shares the same goals as
 26 the Black Guerilla Family, and is an indistinguishable extension of the Black Guerilla Family.
 27 (*Id.*) The NARN document is a request for the release of "political prisoners," and lists Black
 28 Guerilla Family members. (*Id.*) In sum, the NARN list documenting "political prisoners" is a

1 cover story to publish a list of Black Guerilla Family members, which is contraband that
 2 threatens prison security by allowing prisoners to identify others from within their own gang.
 3 (*Id.*)

4 The second source item is a March 2006 report describing two near-identical rosters of
 5 validated and active Black Guerilla Family prison-gang participants that were recovered in 2005
 6 and 2006 from cells occupied by Black Guerilla Family participants. (Decl. Rice ¶ 7.) The
 7 rosters indicate active Black Guerilla Family participants because corrections and additions were
 8 added by handwriting. (*Id.*) And the rosters reliably indicate that Shamburger is an active
 9 prison-gang participant because he was identified on them as “H. Shamburger.” (*Id.*)

10 The third source item is a January 31, 2003 report from a debriefing prison-gang member.
 11 (Decl. Rice ¶ 8.) The report reliably indicates that Shamburger is an active prison-gang
 12 participant because the debriefing inmate identified Shamburger as a participant in the Black
 13 Movement, another group like NARN that is organized by Black Guerilla Family and is an
 14 indistinguishable extension of Black Guerilla Family. (*Id.*) Shamburger was identified by the
 15 debriefing inmate through the alias “Rafiki Blackness.” (*Id.*) The cumulative intelligence
 16 resources of CDCR and the Office of Correctional Safety includes proper identification of
 17 prison-gang-members’ aliases, and Shamburger is reliably known to go by the alias “Rafiki
 18 Blackness.” (*Id.*) The debriefing inmate’s information is reliable because it included admissions
 19 against his own interest, as well as numerous details that are fact-checked by the cumulative
 20 intelligence of CDCR and the Office of Correctional Safety. (*Id.*)

21 Because reliable evidence demonstrates Shamburger’s continuing prison-gang participation,
 22 Defendants are entitled to summary judgment.

23 **V.** 24 **DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

25 **A. The Standard for Finding Qualified Immunity.**

26 The defense of qualified immunity protects “government officials . . . from liability for civil
 27 damages insofar as their conduct does not violate clearly established statutory or constitutional
 28 rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800,

1 818 (1982). The rule of qualified immunity "provides ample protection to all but the plainly
 2 incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 495 (1991)
 3 (citation omitted).

4 When a governmental official is accused of a constitutional violation, a particular sequence
 5 of questions must be considered to determine if qualified immunity exits. *See Saucier v. Katz*,
 6 533 U.S. 194 (2001). First, a court must ask: "Taken in the light most favorable to the party
 7 asserting the injury, do the facts alleged show the officer's conduct violated a constitutional
 8 right?" *Id.* at 201. If no constitutional right was violated under the alleged facts, the inquiry ends
 9 and defendants prevail. *Saucier*, 533 U.S. at 204.

10 If, however, a constitutional violation could be construed on a favorable view of the
 11 opposing party's submissions, the next step is to determine whether the right was clearly
 12 established. *Id.* at 201–02. The right's contours must be so clear that a reasonable official would
 13 know that his actions violate that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The
 14 relevant, dispositive inquiry in determining whether a right is clearly established is whether it
 15 would be clear to a reasonable officer that his conduct was unlawful in the situation he
 16 confronted." *Saucier*, 533 U.S. at 202. Officers can make mistakes about what evidence
 17 requires an inmate's further retention in the SHU, yet they will still be protected by qualified
 18 immunity as long as they acted reasonably under the circumstances. *Id.* at 205–06.

19 **B. No Defendant Violated Any of Shamburger's Constitutional Rights.**

20 The first step under *Saucier* is to determine whether, taken in the light most favorable to the
 21 party asserting the inquiry, the facts alleged show that the officer's conduct violated a
 22 constitutional right. *Saucier*, 533 U.S. 194. As discussed above, Shamburger cannot make out a
 23 constitutional violation here. Under *Saucier*, this Court's inquiry should end here.

24 **C. Defendants Are Entitled to Qualified Immunity Because It Would Not Have Been**
 25 **Clear to Reasonable Officials that Their Conduct Was Unlawful.**

26 Even if Shamburger's allegations were to establish a constitutional violation, Defendants
 27 would not clearly have known that their conduct was unlawful. *Saucier*, 533 U.S. at 202.
 28 Officers can make mistakes about the facts requiring a response, yet they will still be protected

1 by qualified immunity as long as they acted reasonably under the circumstances. *Id.* at 205–06.

2 Even assuming that the policies and regulations and living conditions at issue are
3 unconstitutional, Defendants are still entitled to qualified immunity because it would not have
4 been clear to a reasonable official in any of Defendants' situations that the conduct at issue was
5 clearly unlawful. Shamburger fails to point out where a reasonable official in any of Defendants'
6 positions would have thought they were clearly engaged in unlawful conduct violating an
7 inmate's constitutional rights. Rather, as shown above, Defendants properly followed state law
8 and prison procedure, and reasonable officials in their position could have thought their actions
9 were lawful.

10
11 **Conclusion**

12 Because Shamburger failed to exhaust administrative remedies for most claims before filing
13 this action, and because other claims were screened out or barred by the statute of limitations,
14 Shamburger's only claim not to be dismissed concerns his due process in being retained in the
15 SHU.

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1 Defendants are entitled to summary judgment concerning this remaining due-process claim
2 because Shamburger regularly received proper housing reviews, and because reliable evidence
3 indicated Shamburger's continuing prison-gang participation. Further, Defendants are entitled to
4 qualified immunity because Shamburger's rights were not violated, and reasonable officials in
5 Defendants' positions could believe their behavior was lawful.

6
7 Dated: August 14, 2008

8 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Shamburger v. Kirkland, et al.**

Case No.: **C 07-4597 JSW (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 14, 2008, I served the attached

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

DECLARATION OF KENNETH T. ROOST IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DECLARATION OF LT. R. RICE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

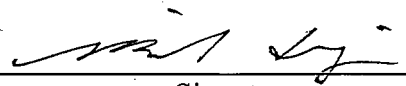
[PROPOSED] ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Harold B. Shamburger
D-16530
Pelican Bay State Prison
P.O. Box 7000
Crescent City, CA 95531-7000
Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 14, 2008**, at San Francisco, California.

M. Xiang
Declarant


Signature